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No. 305

In the Supreme Court of the United States

OCTOBER TERM, 1970

OSCAR EVERETT TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 501

OSCAR EVERETT TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1970. A petition for rehearing was denied on July 8, 1970. The petition for a writ of certiorari was filed on August 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

1. Whether it was proper to introduce evidence that petitioner volunteered to produce exculpatory

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documents during the pre-trial period, but failed to do so.

2. Whether the evidence showed that petitioner caused the use of the mails.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Kentucky of mail fraud in violation of 18 U.S.C. 1341 and sentenced to two years' imprisonment. The Court of Appeals for the Sixth Circuit affirmed, *per curiam*.

The principal witness for the United States was Kenneth McAninch of Jackson, Mississippi. He met petitioner at a Masonic training session in Jackson which lasted several days (A. 59, 148). Petitioner talked to McAninch about investing certain surplus funds in debentures issued by the Insurance Investors Trust Co. of Louisville, Kentucky. Petitioner represented himself as being a division sales director of the company (A. 124). He suggested to McAninch that since Kentucky laws would prevent McAninch, a non-resident, from holding the securities in his own name, he should give his money to petitioner. Petitioner promised to invest the money in his own name and pass the profit on to McAninch (A. 151). McAninch then gave petitioner two checks totaling $2,000 for purchase of the debentures (A. 60, 152). Petitioner thereupon left Jackson for Kentucky and deposited the money in his own and his wife's accounts (Tr. 241).

Subsequently, petitioner and McAninch talked on the phone several times. On June 8, 1964, McAninch sent

petitioner, by certified mail, a cashier's check for $5,040 for the purchase of more debentures (A. 60-61). He then called petitioner to tell him that the check was on its way. Petitioner told McAninch that he need not have done so as petitioner would be returning to Jackson soon (A. 153). Nevertheless, petitioner signed for the letter and cashed the check (A. 62). Petitioner did return to Jackson on June 16, and there induced McAninch to give him an additional $4,000 for investment in the debentures and also in another company, Deepwell Petroleum (A. 64).

Several times thereafter, McAninch telephoned petitioner in Kentucky, asking that he send the debentures and, later, that he send back McAninch's money (A. 68, 69). Finally, in March or April of 1969, petitioner admitted to McAninch that none of the money had ever been invested in the debentures or in Deepwell stock but promised to return the money (A. 69).[1] Of the total of $11,040 McAninch had "invested," petitioner returned $1,000 to him (A. 70).

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[1] On cross-examination, counsel for petitioner asked McAninch if "Mr. Taylor could reasonably have concluded, based on your entire relationship, that you had turned money over to him to be invested by him on your behalf in fields and ventures which he considered most financially rewarding to you?" To this, McAninch replied "He perhaps did" (A. 77). However, McAninch never specifically authorized any other investments than Deepwell and Insurance Investors, and petitioner never advised McAninch that any such investments had ever been made (A. 70). Indeed, no evidence ever appeared to indicate that petitioner had invested McAninch's money in anything.

ARGUMENT

I. When this matter came to the attention of the government, petitioner was interviewed by a postal inspector. The inspector fully advised petitioner of his rights; stressing his right to have counsel present and to terminate the interview at any time (App. 98a–99a). At that interview, petitioner stated that he had in fact invested McAninch's money in legitimate enterprises and could produce documentary evidence to prove it. The postal inspector responded that he would be "very receptive" (A. 134) to any exculpatory material which petitioner could produce—as, indeed, any officer investigating the issue whether or not to prosecute properly should be. The inspector in no way demanded such material; the suggestion of producing it was made by petitioner. Nor did petitioner ever withdraw his offer on the ground that he had concluded it might incriminate him. Rather, petitioner contacted the postal inspector on several subsequent occasions, promising faithfully to produce the documents; but he never did so (A. 135).

After a hearing, the trial judge concluded that the statements made to the postal inspector Glassman, including those relating to the promise to produce documents, were given freely and voluntarily and hence were admissible (App. 113a–114a). The judge specifically instructed the jury that petitioner was under no obligation to produce the papers (A. 204).

In all the circumstances, petitioner's volunteered promises and subsequent non-compliance therewith were properly introduced in evidence against him.

The situation is wholly unlike that in *Boyd* v. *United States*, 116 U.S. 616, where a statute compelling production of papers under penalty of having judgment based upon non-production was held to violate the Fifth Amendment. There was no compulsion of any kind in this case.

2. Petitioner contends that the evidence does not show that he caused the use of the mails. As he recognizes, one is held to have caused the mails to be used under 18 U.S.C. 1341, if such use will follow in the ordinary course of business or can be reasonably foreseen. *Pereira* v. *United States*, 347 U.S. 1, 9. In this case, by first encouraging McAninch to invest money with him and then going to a different state, petitioner could reasonably have foreseen that McAninch would use the mails to send him a check. It was not necessary that petitioner either "know" or "intend" that such use of the mails would occur. *United States* v. *Scandifia*, 390 F. 2d 244, 250 (C.A. 2), vacated on other grounds, 394 U.S. 310.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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